Filed 1/25/10 In re D.M. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re D.M. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. DARRELL M., Defendant and Appellant.	G042315 (Super. Ct. Nos. DP016523, DP016526) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

Darrell M. (father) appeals from an order finding that now 11-year-old D.M. and 7-and-a-half-year-old E.M. have a probability of being adopted, selecting adoption as the permanent plan, and continuing the permanency hearing (Wel. & Inst. Code, § 366.26; all further statutory references are to this code) for 180 days for Orange County Social Services Agency (SSA) to attempt to locate adoptive parents. (Father also filed a notice of appeal challenging termination of his parental rights to his other two children but he subsequently abandoned that appeal, as acknowledged in his opening brief.) He contends the court should have determined the children are not adoptable and selected long-term foster care as the permanent plan. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

This is the second time this case has been before us. The first time we denied petitions for a writ of mandate filed by father and the children's mother (who does not appeal the ruling at issue) after the court terminated reunification services and set the permanency hearing. (*Darrell M. v. Superior Court* (May 20, 2009, G041784) [nonpub. opn.].) In that opinion we laid out the facts leading to the original petition and termination of services, which we repeat here only as relevant to this decision. (*Id*. at pp. 2-6.)

According to the report prepared for the permanency hearing, about the time reunification services were terminated D.M. and E.M. were placed in a sibling assessment facility. A cousin, who had had custody for nine months, asked that they be relocated because of problem behavior and she could not give the children the personal attention they needed with six other children in the home.

Both children had severe behavioral and emotional problems. D.M. was sexually abused by his grandfather since he was eight years old. He has Attention Deficit Hyperactivity Disorder (ADHD) and Post Traumatic Stress Disorder. He is being treated

with medication, to which he is responding well. Academically he was below his grade level, got frustrated in class, and resisted doing his homework. He had difficulty interacting with his schoolmates, although he had begun to make better choices dealing with other children. His lack of skill in problem solving sometimes lead to shutting down or tantrums.

D.M. is being seen by a psychiatrist, psychologist, and family therapist. The latter, whom he sees weekly, reports D.M.'s behavior is improving, particularly with the intense treatment giving at his current facility. He is beginning to open up in discussing his problems.

E.M. has Attention Deficit Disorder and Pervasive Development Disorder and may be mildly autistic. Although medication has been prescribed he has refused to take it. He is behind in speech and motor skills but his incontinence has improved. Academically he "shows minimal skills" and gets frustrated quite easily. The school has developed a plan to assist him, including giving him headphones to play music or white noise to block out distractions when he has difficulty focusing later in the day.

He sees the same mental health professionals as D.M. His therapist noted improvement in his behavior toward other children. His impulse control skills are minimal, resulting in kicking and throwing things when frustrated. Medication may be beneficial in improving concentration and calming him. E.M.'s psychologist noted he is usually "upbeat" until corrected but he is easily frustrated when he cannot complete a task or get his way.

Both children have many positive characteristics. They are physically healthy and attractive. They are "always smiling, athletic, energetic, affectionate and loving." D.M. is artistic and imaginative, his motor skills and hand-eye coordination are good. He received a "most improved" award at his church.

The therapist reported the children's several failed placements decreased their self-worth. Their problems are such that it would be difficult for most caregivers to

cope with and needed a higher level of treatment and care so they should not be immediately put in foster care. The hope was that with continued therapy and medication they will be able to control impulses and not need as much treatment/care.

The original report for the hearing recommended long-term foster care. At the hearing two days later the recommendation changed to adoption with the 180-day continuance to find adoptive parents. Father submitted on the reports admitted into evidence and waived his right to a hearing.

In terminating parental rights and finding the children adoptable although difficult to place, the court acknowledged the children's behavioral problems. It concluded, however, that they could "be addressed through the medical intervention . . . currently in place . . . ." The court also relied on the statutory preference for adoption.

As to D.M. it noted he was "beginning to stabilize on his medication regimen" for ADHD, was "responding to the structure and intensive treatment" in the facility in which he was living, was more willing to discuss his problems in therapy, and was beginning to make better choices and "avoid negative influences." As to E.M. the court again noted medications were "expected" to calm him and help his concentration. It also recited the steps taken to deal with his behavioral issues, including use of headphone to improve his concentration by blocking "auditory distractions" and rewarding good behavior.

DISCUSSION

Under section 366.26, subdivision (c)(3), "[i]f the court finds that termination of parental rights would not be detrimental to the child . . . and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be

made to locate an appropriate adoptive family . . . within a period not to exceed 180 days. . . . At the expiration of this period, another hearing shall be held and the court shall proceed" to terminate parental rights or appoint a legal guardian under section 366.26, subdivision (b)(1) or (4).

Father contends there was insufficient evidence to show the children were adoptable and its order "foreclosed the possibility of long-term foster care as the ultimate placement for [them]." He asserts that the children's severe behavioral and emotional problems undercut the possibility of adoption and that the court's ruling was speculative and "[b]ased on not much more than wishful thinking." He points to the court's statements that the medications were "'expected'" to help, the probability of adoption "'would arise,'" and matters that "'can'" be addressed.

Father relies on *In re Ramone R.* (2005) 132 Cal.App.4th 1339 to support his argument. That case reversed the trial court's order that the child was adoptable though difficult to place and continuing the hearing to find adoptive parents, holding there was "no evidence" the child was adoptable. (*Id.* at pp. 1343, 1351.) Although there are some similarities to the present case there are significant differences as well.

Here, as there, the children's behavioral difficulties and medical conditions make them "difficult to place." But the *Ramone R.* child's problems were more extreme. At a year old, after being severely burned, when taken into custody he was placed in a foster home for medically fragile infants, placed on antibiotics, and required to wear compression stockings full time. He screamed constantly, day and night, did not sleep, engaged in head banging and tantrums where he kicked and screamed, stripped off his clothing, and played with his feces. He rarely made eye contact and did not interact. Additionally, there had been no diagnosis of his psychological and emotional problems nor a treatment regimen begun.

That is not the case here. While D.M. and E.M. have behavioral problems, they have been diagnosed and are being treated with medication and therapy and they

have made some progress in overcoming the problems. They do not require attention 24 hours a day and care is expected to decrease as the medication and therapy continue. Moreover, they both have positive traits: they are physically healthy and attractive, energetic, athletic and "affectionate and loving." Father supported placement of the children in an adoptive home as opposed to a group home. This presents quite a different picture than the one in *Ramone R.*

This is so despite their therapist's opinion their problems are severe enough to discourage most foster parents and that they need more care than normal. Further, that E.M. has in the past refused to take his medication does not mean that he will not take it or that it will not be effective, as the therapist believed.

Our case is much more comparable to *In re Gabriel G.* (2005) 134 Cal.App.4th 1428.) There the children had behavioral problems, including fighting with each other, "uncontrollable tantrums," and hitting. One child needed to improve his speech and had deferred dental work. The other was educationally behind in kindergarten, but both were generally physically healthy and on target, friendly and appealing. The court upheld an order the same as the one being appealed here. (*Id.* at p. 1431.)

There appears to be a split of authority as to the standard of review, abuse of discretion, where we give great deference to the court's order (*In re Ramone R., supra*, 132 Cal.App.4th at p. 1351), or substantial evidence (*In re Gabriel G, supra*, 134 Cal.App.4th at p. 1438). Under either standard the present order is correct. There is evidence in the record showing the probability of adoption. The court considered and weighed the evidence and took into account the statutory preference for adoption. (§ 366.26, subd. (b); *In re S.B.* (2008) 164 Cal.App.4th 289, 297.) On the other hand, father's choice, permanent long-term foster care, is the least preferable option. (§ 366.26, subd. (b)(5).)

As to father's argument the order prevents long-term foster care should no adoptive family be found, we agree with SSA. In *In re S.B.* (2009) 46 Cal.4th 529 the issue was whether an order such as the one before is appealable. The court held it was. In so doing it considered an argument by the county child welfare services department about alternatives to adoption and guardianship should neither pan out, stating: "[T]he legislative scheme does not foreclose any avenue toward a suitable placement. If adoption proves to be impossible, that change of circumstances would justify a modification of the findings and order made by the court under section 366.26[, subdivision](b). (§ 338.) In a modification proceeding, all the relevant circumstances will be before the court and long-term foster care can be instituted with the appropriate provisions for periodic review, ensuring that the child is not in danger of falling through the cracks. [Citation.]" (*In re S.B., supra*, 46 Cal.4th at pp. 536-537.)

In rebuttal to SSA's argument, based on *S.B.*, that the order does not thwart long-term foster care, father argues the quoted language is superfluous because the case dealt solely with the issue of appealability of orders such as the one considered here. We have no reason to disregard the statements in *S.B.* that would allow for other placement alternatives based on changed circumstances.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.